Date Issued: JAN 25 1992

Case No.: 91-JSA-1

In the Matter of:

YVON BRIAND,
Complainant,

v.

KEITH PELLETIER LOGGING,
Respondent.

Yvonne Sening, Esq.
Office of the Solicitor, Department of Labor
For the Complainant

Robert Michaud, Esq.
For the Respondent

Before: JAMES GUILL
Administrative Law Judge

DECISION AND ORDER

This case arises under the Wagner-Peyser Act, as amended, 29 U.S.C. 49 et seq.[1], and the regulations at 20 C.F.R. Part 655. On June 16, 1990, Yvon Briand, hereafter Complainant, filed a complaint with the Maine Department of Labor alleging that Keith Pelletier Logging (Respondent), had denied him employment as a logger/wood cutter, choosing to hire alien workers instead (AF-D). By decision dated August 6, 1990, the Monitor/Advocate for the Maine Department of Labor determined that there was no basis for this complaint (AF-F, G). Thereafter, Complainant requested a hearing, which was conducted by a State administrative hearing officer in Fort Kent, Maine, on October 2, 1990. In a decision dated November 15, 1990, the hearing officer determined that Respondent had violated certain assurances required by §655.203(c). Specifically, he determined that Respondent had rejected Complainant's application for employment for other than job-related reasons.

[1]All applicable regulations which are cited in this Decision and Order are included in Title 20, C.F.R., and are cited by part or section only. The Respondent's Exhibits have been denoted ” R- " ; Exhibits included in the Administrative File, "AF-"; the transcript of the hearing held on August 20, 1991, *'Tr."

Pursuant to the provisions of 20 C.F.R. 658.418(c), Respondent appealed the hearing officer's decision to the U.S. Department of Labor's Regional Administrator. By decision dated April 9, 1991, the Regional Administrator affirmed the hearing officer's decision, finding that Respondent had violated §§655.203(c) and 655.203(e). Respondent timely requested a formal hearing before the Office of Administrative Law Judges. In accordance therewith, a hearing was conducted in Caribou, Maine, on August 20, 1991. Pursuant to the requirements of 20 C.F.R. §658.425(b), this Decision and Order is based on the hearing record, the Administrative File, which contains the record before the State agency and the investigation and determination of the Regional Administrator, and the evidence and legal briefs submitted by the parties.

Findings of Fact

Respondent, Keith Pelletier Logging, Inc., is owned and operated by Keith Pelletier (Tr. 77-78). On May 17, 1990, Respondent obtained a temporary labor certification from the, Regional Administrator, Employment and Training Administration, U.S. Department of Labor, for the purpose of recruiting temporary alien workers during the 1990-1991 logging season (R-4; Tr. 79). As a condition of this certification, covering the period from June 6, 1990, to March 8, 1991, Respondent agreed to recruit U.S. workers through the Employment Service System established , pursuant to the Wagner-Peyser Act. A primary requirement of this certification was that Respondent would reject applications for employment only for lawful, job-related reasons.

Complainant, a resident of the Province of Quebec, Canada, has worked as a wood cutter/logger for the past thirty-one years, and has been a United States citizen since 1986 (Tr. 14, 18). In conjunction with the work he performs as a cutter, he also operates his own "skidder," a tractor of sorts used for skidding trees out of the woods once they have been cut down (Tr. 18, 39). In his capacity as a wood cutter/skidder operator, Complainant is paid for each cord of wood cut, as well as each cord he snakes with his skidder (Tr. 29, 38-39).

On May 23, 1990, Complainant contacted James Pelletier, owner of Pelletier and Pelletier Logging, a company for which Complainant worked in 1976. Respondent is a subcontractor for Pelletier and Pelletier Logging, and James Pelletier is the father of Keith Pelletier (Tr. 94, 96). Complainant asked James Pelletier about the possibility of obtaining work with Respondent (Tr. 30-31, 33). James Pelletier informed Complainant that he was uncertain as to when Respondent would begin working (Tr. 21-22, 43). In early June, Complainant visited James Pelletier at his home, and presented him an application for employment with Respondent (Tr. 22-23). Again, James Pelletier informed Complainant that he was not sure when Respondent would begin working (Tr. 23-24).

On June 8, 1990, Complainant visited the Department of Labor, Job Service Office, at Presque Isle, Maine, and received a second application for employment. Complainant completed this application with the help of an individual at the union office in Fort Kent, Maine. While at the union office, Complainant was informed that Respondent had begun work and was hiring (Tr. 20- 21, 30, 42-43). On June 11, 1990, Complainant went to Respondent's garage, and was told by

Keith Pelletier's brother to submit the second application to James Pelletier (Tr. 21, 25, 46- Upon submitting the application to James Pelletier, . 47). Complainant asked Mr. Pelletier why he had not been hired by Respondent. Mr. Pelletier stated that it was because Complainant had missed work in.1976 (Tr. 25). Subsequently, on June 18, 1990, Complainant spoke to James Pelletier on the telephone. During this conversation, Mr. Pelletier informed Complainant that Respondent had hired enough "bonds" (alien workers), and that he did not need Complainant (Tr. 26).

In a letter to Sharon Timberlake, the Monitor/Advocate for the Maine Department of Labor, dated July 19, 1990, Keith Pelletier explained his reasons for not hiring Complainant. He stated, with regard to Complainant and one other individual:

> They worked for us 7 to 8 year ago, exact date unknown. several (sic) times they left the job site when they were supposed to be working probably to go look for work else-where and in the meantime their work was not getting done. They often did not follow orders and violated landowner and lurc (sic) regulations.

Keith Pelletier testified that the information was based on what his father had told him, and stated that neither he, nor his father, had contacted any of the three references provided in Complainant's application (Tr. 94-95). Additionally, Keith Pelletier testified that his father was the one who had reviewed Complainant's application, and had made the actual decision not to hire Complainant (Tr. 94). Keith Pelletier's rationale for relying exclusively on his father's recommendation was that his father "had been in the business longer than himself." (AF-A, p. 22)

James Pelletier testified before the administrative hearing officer. Therein he stated that his recommendation not to hire Complainant was based on Complainant's work performance with Pelletier and Pelletier Logging in 1976. James Pelletier then contended that Complainant had left the job site on several occasions to look for other employment when things "did not go his way," and also stated that Complainant had left work after only "two or three months." (A&A, p. 28). Mr. Pelletier did not state, however, that Complainant had violated either L.U.R.C. or landowner regulations. While he did state that Complainant "needed a lot of supervision," he offered that "every wood cutter needs a lot of supervision." (AF-A, pp. 29-30) He also described Complainant's work as having been "downright acceptable," and offered that the problems he had had with Complainant were no worse than they were with other cutters (AI'-A, pp. 29-30).

James Pelletier did not testify in this proceeding, nor was an explanation offered by either party as to why he was not called as a witness. Given the relevancy of his testimony to the issues presented in this proceeding, I find such absence of offering by both parties nothing short of remarkable. This is especially so considering that the hearing was held reasonably near James Pelletier's operations.

Herman Guimond, who was Complainant's foreman at Pelletier and Pelletier, testified credibly at the hearing herein. Although Mr. Guimond stated that Complainant had missed four

weeks of work in 1976,[2] he did not mention the L.U.R.C. and landowner violations alleged by Respondent, nor did he state that Complainant had occasionally left the job site to look for other work, or that Complainant had left work after only two or three months. Additionally, although Mr. Guimond was responsible for c reprimanding and/or firing workers, he stated that at no point did he ever reprimand Complainant (Tr. 65, 75).

According to Keith Pelletier, a cleanup crew began work for his company on June 11, 1990 (Tr. 87). The job of the cleanup crew was to remove trees that had been cut down, and buried in snow during the winter (Tr. 87). Although he testified that the cleanup crew is usually comprised of his prior workers, Keith Pelletier stated that anyone could perform this job (Tr. 87, 114). Also, he stated that five of the workers who were part of the cleanup crew were "bonds" (Tr. 113). On June 20, 1990, Complainant began working for Bobby McBriarty as a wood cutter/skidder operator (Tr. 26, 32). During the 1990-1991 logging season,. Complainant earned approximately $43,000 in gross wages for wood cutting and skidder work (Tr. 29).

Conclusions of Law

A primary objective of the Immigration and Naturalization Act, 8 U.S.C. §1101 et seq., is to ensure that nonimmigrant alien workers not be admitted to fill a particular temporary job if there are qualified U.S. workers available and willing to fill the job opportunity. The regulations at Part 655, which are designed to implement the policies of the Act, require that employers who have filed a temporary labor certification give certain assurances with regard to the hiring of such workers. Specifically, §655.203(c) states that an employer must assure that "[t]he job opportunity is opened to all U.S. workers," and that "[n]o U.S. worker will be rejected for other than a lawful job-related reason." Additionally, §655.203(e) requires that "[f]rom the time the foreign workers depart for the employer's place of employment, the employer will provide employment to any qualified U.S. worker who applies to the employer until fifty percent of the period of the work contract, under which the foreign worker who is in the job was hired, has elapsed."

Section 656.21(b)(7) requires that if U.S. workers have been rejected for the job opening in question, "the employer shall document that they were rejected solely for lawful, job-related reasons." In determining what constitute "lawful and job-related reasons," existing authorities support the application of an objective, rather than a subjective standard. See Moore v. Maine Department of Manpower Affairs, et al., 388 A.2d 516, 519 (Me. 1978). BALCA has stated that "U.S. applicants may be lawfully rejected for the inability to perform, despite meeting the minimum specified requirements. However, a more objective, detailed basis of its conclusions

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[2]As the testimony of both Mr. Guimond and Complainant indicates, Complainant missed two weeks of work in July, 1976, when his skidder broke down, and also missed two weeks in September, 1976, when he went moose hunting (Tr. 67-69). Although Mr. Guimond challenged the propriety of the hunting trip, faulting Complainant for having left work during what Mr. Guimond described as one of the busiest periods in the logging season, he testified that neither he nor James Pelletier said anything to Complainant at the time (Tr. 67). Complainant stated that when he informed James Pelletier and Mr. Guimond of his decision to go hunting, neither one objected (Tr. 48-50).

must be provided by an employer."[3] Quality Inn, 89-INA-273 (May 23, 1990). Consistent with this rationale, BALCA has also held that an "employer is required to explain, with specificity, the lawful job-related reasons for not hiring each U.S. worker interviewed." Fritz Garage, 88-INA-98 (Aug. 17, 1988)(en banc); see also Raven Elevator, supra.

Keith Pelletier testified that he relied entirely on the recommendations of his father in deciding not to hire Complainant. In support of his position, Respondent argues that since he reasonably relied on such recommendation, he is not responsible for the truth and/or reliability of this recommendation. Were this a normal employment situation, such unquestioning reliance might have been acceptable. However, to the extent that Respondent had received temporary labor certification, he was under an obligation to ensure that no qualified U.S. worker would be denied for other than a lawful, job-related reason. This obligation contemplates more than simply unquestioned reliance on another person's recommendation regarding questionable incidents which occurred some fourteen years earlier. This is especially so, given that James Pelletier had previously testified that while Complainant was hard to. supervise, s0 are all cutters, and that the problems he had had with Complainant were no worse than they were with other workers, and Mr. Guimond's testimony that Complainant was not reprimanded for his alleged recalcitrant work activities.

While Respondent has offered these reasons for his decision, he has not established the credibility of such. James Pelletier's recommendation appears, at best, to have been arbitrary. For these reasons, I find that Respondent has not established that its reasons for rejecting Complainant's application for employment were "lawful and job-related," and that it violated its assurances under §655.203(c) and 655.203(e). Accordingly, the Regional Administrator's Decision is affirmed.

Pursuant to 9658.425(a)(4), which gives an administrative law judge authority to "[r]ender such . . . rulings as are appropriate to the issues in question," I find that Employer should pay Complainant for the two weeks of work which he missed.

It is therefore ORDERED that:

1. Complainant shall be paid an amount equal to two weeks wages based on his average wages earned while logging during the 1990 season and, in addition, an amount equal to two weeks of his average skidder rental in 1990. The parties shall reach an agreement on this amount within ten days of the mailing of this Decision and Order.

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[3]Although there is no caselaw under the temporary labor certification program for non-H-2a workers which deals directly with this question, the Board of Alien Labor Certification Appeals (BALCA),.which addresses questions of permanent labor certification, has dealt with this question. Since the goals of the permanent labor certification and temporary labor certification programs are consistent with one another to the extent that they each establish a preference for U.S. workers and seek to ensure that U.S. workers are not adversely affected by the hiring of alien workers, I find that BALCA caselaw is applicable.

2. Employer shall prepare a plan for the present and future logging seasons which assures that, wherein he seeks temporary labor certification, U.S. workers are credibly considered before the hiring of any temporary alien workers. This plan shall be submitted to the Maine Job Service for its approval no later than at the time an application of temporary certification is submitted by the Employer.

At Washington, D.C. Entered: Jan. 23, 1992

by

JAMES L. GUILL
Administrative Law Judge

JG/ac